TAB H

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of **Qwest Communications International Inc., Consolidated Application For Authority To Provide In-Region, InterLATA Services In The States Of Montana, Utah, Washington, and Wyoming**	)	WC Docket No. 02-189

DECLARATION OF KENNETH L. WILSON

1. My name is Kenneth L. Wilson, and I am a senior Consultant and Technical Witness with Boulder Telecommunications Consultants, LLC. My business address is 970 11th Street, Boulder, Colorado, 80302. I am submitting this affidavit on behalf of AT&T Corp.

2. My education and relevant work experience are as follows. I received a Bachelors of Science in Electrical Engineering from the University of Illinois in 1972, and I received a Masters of Science in Electrical Engineering in 1974. In addition, I have completed all the course work required to obtain my Ph.D. in Electrical Engineering from the University of Illinois. The course work was completed in 1976. For 15 years before coming to Denver, I worked at Bell Labs in New Jersey in a variety of positions. From 1980 through 1982, I worked as a member of the network architecture and network planning team at Bell Labs for AT&T's long distance service. From 1983 through 1985, I was a member of the first AT&T Bell Labs cellular terminal design team. From 1986 through 1992, I led a Bell Labs group responsible for

network performance planning and assurance for AT&T Business Markets. From 1992 through 1993, I was a team lead on a project to reduce AT&T's capital budget for network infrastructure.

3. From January 1994 through May 1995, I led a team at Bell Labs investigating the various network infrastructure alternatives for entering the local telecommunications market. From 1995 through the spring of 1998, I was the Business Management Director for AT&T in Denver, managing one of the groups responsible for getting AT&T into the local market in Qwest's 14-state territory. In addition, I was also the senior technical manager in Denver working on local network and interconnection planning, OSS interface architectures and the technical aspects of product delivery.

4. As noted above, I am currently a consultant and technical witness with Boulder Telecommunications Consultants, LLC. In this capacity, I have worked with several companies, including AT&T, on all aspects of interconnection, unbundled elements, collocation and resale issues, among other things. My C.V. is attached hereto as **Exhibit KLW-1**.

I. CHECKLIST ITEM #1: INTERCONNECTION

A. Interconnection

5. Interconnection is the physical linking of two networks for the mutual exchange of traffic.[1] Qwest is required to provide interconnection at any technically feasible point within its network that is at least equal in quality to that provided by Qwest to itself or others on rates, terms and conditions that are just, reasonable and nondiscriminatory. Qwest must also provide interconnection in a manner no less efficient than the way in which it provides comparable

[1] 47 C.F.R. § 51.5 (definition of interconnection).

function to its own retail operations.[2] In addition, the FCC has stated that CLECs may "choose any method of technically feasible interconnection at a particular point on the incumbent LEC's network. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements."[3] The point of interconnection (or POI) is the location where the parties mutually hand off their traffic.[4]

6. Qwest's SGATs fail to comply with these requirements in several respects. In all four states, Qwest forces CLECs to pay an unlawful loop charge ("entrance facility") when purchasing interconnection trunks. Qwest also forces CLECs to pay unlawful deposits based on Qwest-determined forecasting for CLEC needs, and unlawfully maintains the right to "snatch back" interconnection trunking if CLEC utilization falls below a Qwest-determined threshold. In four states, Qwest unlawfully refuses to permit the CLEC to combine local and toll traffic on the same trunks, and in all four states it unlawfully refuses to permit the CLEC to combine private line trunks and interconnection trunks on the same facilities. Qwest also imposes an unlawful 50-mile limitation on building interconnection trunking. All of these restrictions directly inhibit facilities-based competition, by raising the costs or placing unreasonable limitations on CLECs' efforts to rely on their own facilities.

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[2] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region IntraLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (1999) at ¶ 65 ("*FCC 271 BANY Order*").

[3] *FCC 271 BANY Order* at ¶ 66 (emphasis added).

[4] Furthermore, the FCC's rules related to the general rate structure of dedicated facilities require that "[t]he costs of dedicated facilities shall be recovered through flat-rated charges," and "[t]he costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users. Costs of shared facilities may be apportioned either through usage-sensitive charges or

1. Qwest Forces CLECs To Pay For Both "Entrance Facilities" and "Direct Trunked Transport" When Obtaining Interconnection Trunks.

7. Qwest's SGATs in all four states impose unlawful "entrance facility" charges on CLECs obtaining interconnection trunks from Qwest. These entrance facility charges are anticompetitive and inconsistent with the statute's requirement that the rates for interconnection be nondiscriminatory, just, and reasonable. *See* 47 U.S.C. §§ 251(c)(2), 252(d)(3); *see also* 47 C.F.R. § 51.705.[5]

8. When a CLEC wishes to establish interconnection between its switch and a Qwest switch, Qwest's SGATs deem *any* Qwest-provided transport between the CLEC switch (or other POI) and the nearest Qwest wire center (called the "serving wire center" or SWC) to be an "entrance facility." Qwest's SGATs at § 7.1.2.1 states:

> 7.1.2.1 Qwest-provided Facility. Interconnection may be accomplished through the provision of a DS1 or DS3 entrance facility. An entrance facility extends from the Qwest Serving Wire Center to CLEC's switch location or POI determined by CLEC. Entrance facilities may not extend beyond the area served by the Qwest Serving Wire Center. The rates for entrance facilities are provided in Exhibit A. Qwest's Private Line Transport service is available as an alternative to entrance facilities, when CLEC uses such Private Line Transport service for multiple services. Entrance facilities may be used for Interconnection with Unbundled Network Elements.

9. What this provision means is that whenever a CLEC wishes to establish a connection from its own switch to a Qwest switch using interconnection trunking provided by

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capacity-based flat-rated charges, if the state commission finds that such rate reasonably reflect the cost imposed by the various users." 47 C.F.R. § 51.507(b) & (c).

[5] Qwest imposes nearly identical unlawful loop charges in the context of unbundled transport. *See* Section IV below. Notably, however, in that context the Colorado commission has recognized that such charges are unreasonable and unlawful, and has required to Qwest to amend its SGAT accordingly.

Qwest, Qwest requires the CLEC to purchase an "entrance facility" from the CLEC switch to the nearest Qwest serving wire center. As Qwest makes clear, "entrance facilities" are "high speed digital loops" and are priced as such – *i.e.*, the charges for entrance facilities are flat-rated and *non*-distance-sensitive.[6] If the CLEC wishes to establish interconnection with a Qwest switch beyond the nearest Qwest switch, Qwest forces the CLEC to purchase both the entrance facility (to the Qwest SWC) and what it calls "direct trunked transport" between Qwest switches (*i.e.*, from the Qwest serving wire center to the CLEC's desired Qwest switch). *See* Diagram 1. Direct Trunked Transport is a flat-rated, distance-sensitive charge. *See* Freeberg Interconnection Dec. at ¶ 18 n.10.

10. Qwest's "entrance facility" charges are unlawful because they fail to reflect the way these costs are incurred. There is no economic or engineering difference whatsoever between the first transport link (between the CLEC's switch and the SWC) and the second link (between Qwest's wire centers), and thus there is no conceivable justification for creating separate "entrance facility" and "direct trunked transport" charges. Indeed, the "entrance facility" concept is a relic of the access world; in that context, entrance facilities are priced like loops and were originally designed to function as subsidy elements. The principal effect of these "entrance facility" charges is dramatically to raise the price of interconnection, because the CLEC switch is often in close proximity to the Qwest "SWC."[7]

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[6] SGAT §§ 7.1.2 & 7.1.2.1.

[7] In Washington, the commission ordered Qwest to make only slight revisions to its SGAT provisions, which modified the first sentence in Qwest's Washington SGAT § 7.1.2.1 to read: "Interconnection may be accomplished through the provision of a DS1 or DS3 entrance facility, Direct Trunk Transport or both."

11. The CLEC should be able to order cost-based Direct Trunked Transport from the CLEC switch, directly to the Qwest switch at the end of the trunk, whether that switch is a Qwest tandem or a Qwest end office. The Direct Trunked Transport should run continuously, without need for any entrance facilities or other costs. The CLEC should not be required to order an additional entrance facility, which only serves to raise the cost of interconnection. The absurdity of the Qwest position is most evident when the CLEC builds facilities to a meet point between the CLEC switch and the Qwest serving wire center. Since Qwest's charges for the Entrance Facility are not distance sensitive, Qwest charges the CLEC the full price for the Entrance Facility even when the CLEC builds half-way, or even most of the way, to the Qwest serving wire center.

12. To comply with its obligations to provide reasonable and nondiscriminatory rates for interconnection, Qwest should make Direct Trunked Transport available from the CLEC switch to the Qwest switch, without the addition of a loop or other "Entrance Facility" charge, and solely on a mileage sensitive basis. These trunks are carrier-to-carrier facilities that permit CLECs to hand off and receive local traffic; they should be priced as such. Qwest should cease treating CLECs as if they were end users or long distance carriers that are required to pay access charges.

13. Although the SGATs state that CLECs may request other technically feasible means of interconnection, which Qwest will consider through the Bona Fide Request process (see SGAT § 7.1.1), this provision has nothing to do with Qwest's classification of facilities between the CLEC switch and the Qwest SWC as "entrance facilities," which Qwest insists on pricing as if the CLEC had ordered a loop. In other words, although CLECs may request other technically feasible physical arrangements for interconnection, Qwest will deem any such

request that involves Qwest-provided trunking between the CLEC switch and the nearest Qwest switch to require the provisioning of an "entrance facility," and will bill the CLECs accordingly. The denial of efficient, technically feasible interconnection, based on a sound and economically valid rate design, is unreasonable and discriminatory. 47 U.S.C. §§ 251(c)(2), 252(d)(3); 47 C.F.R. § 51.705.

2. Qwest Imposes Unlawful Construction Charges For Interconnection Trunking, And Unlawfully "Snatches Back" Interconnection Trunks When CLECs Do Not Conform To Qwest-Determined Utilization.

14. Qwest's SGATs contain two blatantly discriminatory provisions concerning the forecasting and maintenance of interconnection trunks. If a CLEC forecasts a need for more trunks than Qwest thinks the CLEC will need, Qwest forces the CLEC to pay a construction deposit, which will not be returned if the CLEC's utilization falls below a certain threshold. And to make matters worse, Qwest reserves the unilateral right to "snatch back" trunks if the CLEC's utilization of a trunk falls below 50 percent – a standard of utilization that Qwest itself does not always meet – and thus forces CLECs to incur the substantial non-recurring costs of reordering new trunks if the CLEC's traffic subsequently increases. Qwest thus imposes significant penalties against CLECs, who cannot meet Qwest's thresholds of trunk usage in many cases. These provisions are anticompetitive, unreasonable and discriminatory.

15. In Section 7.2.2.8.6 of its SGATs in Montana, Utah and Wyoming, Qwest offers these provisions:

> 7.2.2.8.6 LIS Forecasting Deposits: In the event of a dispute regarding forecast quantities, where in each of the preceding eighteen (18) months, trunks required is less than fifty percent (50%) of trunks in service, Qwest will make capacity available in accordance with the lower forecast.

7.2.2.8.6.1 Three (3) weeks after a forecasting cycle, Qwest will provide CLEC feedback in the form of a potentially lower forecast. In the event of a dispute regarding forecast quantities, where in each of the preceding eighteen (18) months, trunks-required is less than fifty percent (50%) of trunks in service each month, Qwest will make capacity available in accordance with the higher forecast if the CLEC provides Qwest with a deposit according to the following terms. As to the difference between the lower and higher forecast, Qwest reserves the right to require, prior to construction, a refundable deposit of up to one hundred percent (100%) of the trunk-group specific estimated cost to provision the new trunks, if CLEC's trunk state wide average utilization over the prior eighteen (18) months is less than fifty percent (50%) of trunks in service each month. Qwest will return the deposit if CLEC's state-wide average trunks in service to trunk usage (utilization) ratio exceeds fifty percent (50%) within six (6) months of the forecasting period to which the deposit applies. If CLEC does not achieve the fifty percent (50%) utilization within six (6) months, Qwest will retain a pro-rata portion of the deposit to cover its capital cost of provisioning. The pro-rata shall assume a full refund when the state-wide average utilization ratio meets or exceeds fifty percent (50%) for one of the six (6) months following receipt of deposit. The pro-rata assumes half (1/2) of the deposit is refunded when the highest state-wide average utilization ratio for any one of the six (6) months after receipt of deposit is twenty five percent (25%). In the event Qwest does not have available facilities to provision Interconnection trunking orders that CLEC forecasted and for which CLEC provided a deposit, Qwest will immediately refund a pro rata portion of the deposit associated with its facility shortfall. Ancillary trunk groups, such as mass calling, are excluded from the ratio.

7.2.2.8.6.2 Where there is a reasonably reliable basis for doing so, Qwest shall include in the trunks-required calculation any usage by others, including but not limited to Qwest itself, of facilities for which that CLEC has made deposit payments. Qwest shall not be required to credit such usage more than once in all the trunks-required calculations it must make for all CLECs in the relevant period.

16. Under these provisions, both the CLEC and Qwest forecast the trunking that will be necessary for interconnection between those two carriers in each coming quarter. Qwest's forecasts are invariably lower than the CLEC's. If the CLEC's utilization has been below 50% in the previous 18 months, and the CLEC's forecasts are higher, the CLEC must pay Qwest a deposit in order to obtain the full amount of trunking that it thinks it will need. If the CLEC's utilization does not reach 50 percent of the CLEC's forecast within 6 months, however, the

CLEC loses its deposit (in whole or in part). In Washington, the same deposits are required on a trunk group basis rather than on the average of all trunks. This difference is marginally better for CLECs, but still has the same result.

17. These provisions are unreasonable and discriminatory. First, they impose on CLECs an arbitrary standard of efficiency that Qwest itself does not meet. Qwest's discovery responses in the state proceedings revealed that Qwest's own trunk utilization in recent months has been consistently below 50% in many states and barely above 50% in the others. Thus, Qwest is demanding that individual CLECs maintain an average trunk efficiency that is in many cases *greater* than Qwest is managing on its own much larger network.

18. Second, it is unreasonable for Qwest to dictate the level of utilization that a CLEC must meet. It is generally more difficult for new entrants to operate their smaller and more variably sized networks at utilization rates that match or exceed the entrenched incumbent. CLECs networks carry smaller volumes of traffic that are subject to greater variability than Qwest's, because CLECs are growing and changing their customer bases more rapidly than Qwest. It is both unreasonable and inequitable from an engineering management perspective to require CLECs to manage their networks with equal or greater efficiency than Qwest has met.

19. Third, the deposit is in any case unreasonable. When a CLEC's utilization falls below 50%, Qwest will likely assess the CLEC a deposit of the estimated capital cost to build the forecasted trunks, but critically, Qwest is not actually building those trunks and reserving them for the use of the CLEC that forecasted them. Rather, the trunks could be lost to Qwest's own internal use or to use by other CLECs long before the forecasting (and deposit-paying) CLEC places its order. The practical impact of this provision is that Qwest is simply forcing CLECs to

fund Qwest's own network capacity growth—something Qwest ought to be providing and paying for itself. This is especially evident if one considers that the vast majority of trunking for which these provisions apply is within the Qwest network, between Qwest switches -- not between the CLEC switch and the Qwest serving wire center, where CLECs establish a connection to the Qwest network. Qwest's supposition of stranded facilities, which is Qwest's rationale for the deposits, is a myth.

20. Finally, if Qwest suffers any excessive inventory problem—as it claims—much of that problem is caused by Qwest's own trunking policies, both past and present. These policies require CLECs to employ (for example) separate trunks to carry interLATA toll and local calls and they require CLECs to obtain trunks to numerous, unnecessary end offices. In addition, Qwest's traditional lack of trunk facilities and its frequent delays in filling trunk orders has caused some CLECs to order more trunks than immediately needed to ensure that they would have adequate capacity to serve future customers without call blocking. Furthermore, in the case of two-way trunks that carry both CLEC and Qwest traffic, Qwest may be as much to blame for under utilization as any CLEC because Qwest's interconnection traffic is carried over these trunks as well as the CLECs'. In short, Qwest's deposit requirements are unreasonable and discriminatory.

21. The practical effect of these provisions is that CLECs scale back their facilities-based market entry to prevent excess blocking. When interconnection trunks are maintained at utilization levels that are high, there is the risk of excessive call blocking, to and from the Qwest network. If too many customers, or even one large customer, are put on the CLEC network without considering the trunking that is needed to carry the calls, excessive blocking will result in the interconnection trunks. AT&T will literally delay putting customers on their network, and

will carefully manage when it adds traffic to the network, to prevent blocking that can be caused by Qwest's unreasonable and costly limitations.

22. Simply put, Qwest's construction deposit provisions are unnecessary and anticompetitive. If a CLEC wishes to order interconnection trunks that it believes it will need and is willing to pay for them, it should be able to order them. Qwest has no authority to impose additional deposits on CLECs based on what *Qwest* thinks the CLEC will need.

23. Qwest's SGATs in Montana, Utah and Wyoming compound the discrimination and the penalties associated with facilities-based entry in Qwest's region by providing (at § 7.2.2.8.13) that once Qwest installs various interconnection trunks for a CLEC, Qwest has a unilateral right to determine that the CLEC is underutilizing its trunks and to snatch those trunks back from the CLEC, regardless of the CLEC's needs or plans for the trunks it holds and pays for. Economically, it makes little sense for CLECs to install, maintain and pay for a vast number of underutilized trunks to Qwest end offices, because such policies cost the CLEC just as much in switch terminations as it does Qwest. CLECs are in the best position to judge and project their future needs for interconnection trunks, and they have every incentive to do so in an efficient way that maximizes their ability to compete. CLECs therefore should determine if it is appropriate to return underutilized trunks to Qwest. Qwest should not be allowed to make such a decision unilaterally. Washington has recognized the need for CLECs to control their trunk size based on their business needs and has allowed CLECs to avoid Qwest's removal of trunks by advising Qwest of the reason for maintaining excess trunks. *See* Washington SGAT § 7.2.2.8.13.

24. Moreover, as noted above, in many states Qwest is not managing its overall trunk average utilization to 50 percent. This means that in any given month, a very large number of

trunks have less than 50 percent utilization. Discovery in some states has shown that Qwest maintains some trunks for months at a time with very low utilization. Qwest's attempts to impose a 50 percent utilization standard on CLECs are blatantly discriminatory, since Qwest does not hold itself to that standard.

25. In addition, it is much easier and more efficient for Qwest to internally manage and resize Qwest network trunks than it is to snatch back trunks from CLECs and force CLECs to re-acquire the trunks to accommodate growth. Furthermore, whenever a CLEC orders a trunk from Qwest, Qwest charges a sizeable nonrecurring cost to the CLEC. As a result, Qwest's practices are not only blatantly discriminatory, but CLECs must pay Qwest (in the form of non-recurring charges to re-order the trunks) for the privilege of living under this discriminatory system.

26. Qwest's SGATs in Montana, Utah and Wyoming effectively place Qwest in the position of overseer of a CLEC's trunk utilization. SGAT § 7.2.2.8.13 gives Qwest the right to determine unilaterally that the CLEC is not using its trunks according to Qwest's utilization demands and then allows Qwest to take back the trunks that Qwest wants. This gives Qwest unprecedented power to interfere in the business of a CLEC regardless of what the CLEC's projected plans or needs for the trunks are. Furthermore, there is nothing in this section that requires Qwest to return the money the CLEC has paid for installing the trunks. And as noted above, Qwest's own trunk utilization on any given trunk may well be below the standard to which it holds CLECs. Thus, Qwest is discriminating against CLECs and not providing parity of treatment.

3. Qwest Prohibits CLECs From Combining Local and Toll Traffic on Interconnection Trunks.

27. Qwest's SGATs in Montana and Wyoming (at § 7.2.2.9.3.2) prohibit CLECs from combining local and toll traffic onto a single trunk group. CLECs such as AT&T have existing switched access trunk groups to Qwest switches for interstate long distance traffic. These same trunk groups may be efficiently used for both the existing interstate toll traffic and for the local traffic as well. Instead, Qwest demands that CLECs use one set of trunk groups for interLATA calls and another set of trunk groups for local and intraLATA calls.

28. Qwest's policy demanding the use of separate trunk groups for interstate toll calling and local calling thrusts an expensive and inefficient use of trunk groups upon CLECs, which impedes competition by erecting cost barriers. This requirement increases the number of trunks, increases the cost of interconnection, and increases the inefficient use of trunk resources. Indeed, it requires CLECs to establish two parallel trunk groups, each of which is operated at sub-optimal utilization, solely because of Qwest's unreasonable restrictions. *See* Diagram 2. This Qwest policy also makes it more difficult for CLECs to meet the utilization criteria discussed in the issue above. Qwest's refusal to allow AT&T to combine this traffic has caused AT&T to add trunking that would otherwise not have been needed. These unnecessary trunks require additional payments to Qwest and also cause AT&T to expend capital on additional switch terminations.

29. Qwest's refusal to allow CLECs to combine local and toll traffic is unreasonable. There is no dispute that combining the traffic is technically feasible. In fact, several states (such as Arizona, Utah, and Washington) have required Qwest to combine such traffic on a single trunk group, and AT&T has been doing so with Qwest for years in those states. Where the

traffic is combined, AT&T provides Qwest with a Percent Local Usage ("PLU") factor so that Qwest may determine the amount of traffic that it should bill as access minutes of use and the percent that it should bill as local traffic (which is based upon TELRIC pricing and subject to the reciprocal compensation rules). Alternatively, Qwest may employ its switch to record the difference in the call-types and bill the CLEC accordingly. In short, interconnection through combined trunk groups is technically feasible and should be provided.

4. Qwest Also Prohibits Combining Private Line or Special Access Trunks and Interconnection Trunks on the Same Facilities.

30. Qwest effectively prevents the efficient use of spare private line facilities for interconnection trunks by charging the CLEC private line rates for interconnection trunks if interconnection trunks and private line trunks are combined on the same facility. CLECs buy special access or private line facilities from Qwest to reach end user customers. These same facilities can be used to efficiently carry interconnection traffic. There is no difference in the technology used to transport the two types of traffic or any other technical reason that the facilities cannot be shared. Proportional pricing can be used to appropriately charge the CLEC for the two types of traffic.

31. Qwest's SGATs in all four states, however, prevent CLECs from establishing such efficient arrangements. In Utah and Wyoming, section 7.3.1.1.2 of Qwest's SGATs effectively prevent the CLEC from using existing spare private line transport facilities for interconnection trunks by charging private line rates for the complete facility, including those trunks that should otherwise be billed under the reciprocal compensation requirements for interconnection purposes. In Montana, Qwest's SGAT prohibits the use of private line facilities to carry interconnection traffic under *any* circumstances. *See* Montana SGAT § 7.3.1.1.2. And

although the Washington commission ordered Qwest to allow interconnection traffic to be combined with special access traffic, Qwest's proposed language to comply with this order excluded special access trunks that are ordered under federal tariff. (Washington SGAT § 7.3.1.1.2.) This once again effectively eliminates the sharing of facilities since most special access is ordered from federal tariffs.[8]

32. CLECs lease special access facilities, such as DS3 or OCn, from Qwest to transport end user traffic directly to the CLEC wire center. These facilities are also called private line facilities. The same facilities can be used to haul interconnection traffic on interconnection trunks from the CLEC switch to the Qwest switch. If a CLEC has an existing DS3 from Qwest to the CLEC office that is half full, it makes no engineering or economic sense to require the CLEC to order a second DS3 facility to establish a few interconnection trunks. *See* Diagrams 3 and 4. Yet that is exactly the effect of § 7.3.1.1.2 in the various Qwest SGATs. Qwest will allow the CLEC to use the private line facility for interconnection, but it charges for the facility as if it were completely private line and refuses to subject the interconnection traffic to reciprocal compensation. The Qwest policy has caused AT&T and other CLECs to order additional, unnecessary facilities for interconnection trunking. The additional facilities add costs to interconnection and exhaust precious facilities that could be used for other purposes.

33. Qwest's refusal to allow CLECs to use the same facilities for both private line and interconnection trunks makes no sense. Qwest's only argument against this is that they could not charge the CLEC as much money. AT&T is willing to pay the appropriate prices for what is

[8] The Washington commission erroneously decided that inclusion of special access ordered under federal tariffs would be beyond its jurisdiction. The Washington commission's concern was incorrect, because allowing interconnection trunks to be combined with special access

used for private line or special access, and TELRIC rates for what is used for interconnection. Since there is no mixing of traffic, each trunk on the facility carries one or the other traffic type and can be charged proportionately.

34. Qwest cannot meet its interconnection obligations by forcing CLECs to build duplicate networks for private line and interconnection. Qwest should be required to allow this efficient use of facilities before they are permitted to enter the long distance market themselves, where they will have no such restrictions. Qwest has not built, nor do they plan to build two duplicate networks for private line and local use trunks for their own use, and it is inconceivable that Qwest would impose such an absurdly inefficient and arbitrary network-design limitation upon itself. Because of these restrictions, CLEC engineers must order their network design inefficiently, based on what regulatory box certain traffic fits into, rather than simply ordering trunks when they would be needed according to sound, efficient engineering principles. Qwest's refusal to permit CLECs to place interconnection traffic on private lines without incurring private-line rates is therefore unreasonable and discriminatory.

5. Qwest Imposes An Unlawful 50-Mile Limitation on Interconnection Trunking Between Qwest Switches.

35. Under § 7.2.2.1.5 of Qwest's SGATs in Washington, Utah, and Wyoming, Qwest arbitrarily limits the direct trunked transport ("DTT") it will construct to 50 miles. DTT, as noted above, is interconnection trunking necessary to link two Qwest switches inside Qwest's own network (as opposed to "entrance facilities," which link a Qwest switch to a CLEC switch). The effect of this arbitrary 50-mile limitation on DTT, therefore, is to require CLECs to build facilities between Qwest switches in the Qwest network that are more than 50 miles apart. There

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would not have changed the price of the special access trunks; it would merely have recognized,

is no legitimate justification for this anticompetitive, cost-raising requirement. The Montana Commission agreed with the CLEC position on this issue. *See* Montana SGAT § 7.2.2.1.5 (50-mile limitations on DTT eliminated).

36. The Act clearly states that it is Qwest's obligation to "provide ... interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access."[9] According to the FCC, "[s]ection 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect."[10] The 50-mile provision will inhibit CLECs from entering some markets where Qwest's facilities are known to be in short supply. The CLEC will know that they will either need to pay Qwest to construct facilities that Qwest will own and use, or face the prospect of excessive call blocking when inadequate interconnection trunks are put in place.

37. Qwest's 50-mile limitation on DTT is thus one further arbitrary obstacle to efficient interconnection that Qwest imposes to raise the costs of facilities-based competition. By definition, the 50-mile limitation applies only within the Qwest network, on trunking that

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properly, that such prices do not apply to all of the traffic on the facility.

[9] 47 U.S.C. § 251(c)(2)(A).

[10] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, First Report and Order, FCC 96-325 (1996) at ¶ 209 ("*First Report and Order*").

connects Qwest's switches. It does not apply to "entrance facilities," the trunks that connect CLEC switches to the nearest Qwest switch. Qwest has an obligation to provide nondiscriminatory interconnection, and to carry the traffic that CLECs originate and hand off to Qwest to its ultimate destination. If Qwest has inadequate capacity within its network to meet those obligations, it is *Qwest's* responsibility, not the CLEC's, to build whatever additional trunking is necessary to meet those obligations.

38. Qwest's SGAT language is most clearly unlawful in Washington. In that state, Qwest's SGAT expressly abrogates the CLEC's right to choose its own point of interconnection (POI). *See FCC 271 BANY Order* at ¶ 66. Under the Washington SGAT, if Qwest's trunking within its network happens to be greater than 50 miles and is at capacity, the CLEC *must* construct its own facilities to a meet-point. *See* Washington SGAT § 7.2.2.1.5 ("the Parties will construct facilities to a mid-point of the span"). These provisions are a direct violation of the CLEC's well-established right to select its own POI, because the CLEC must either forego interconnection or it must build to a meet-point and establish a POI that it does not necessarily want or need. But even in Utah and Wyoming, Qwest refuses to provide interconnection when its "DTT" transport facilities are over 50 miles and at capacity, and forces CLECs to seek a ruling on a case-by-case basis from the state commission as to which carrier will construct (or pay for) the facilities. All of these SGAT provisions are discriminatory and in violation of Qwest's statutory obligations.

II. CHECKLIST ITEM #2: NONDISCRIMINATORY ACCESS TO UNBUNDLED ELEMENTS

A. Qwest Maintains A Discriminatory Policy With Respect To Building Network Elements for CLECs, And Its Policy Of Canceling Orders Where There Is No Spare Capacity Is Also Discriminatory.

39. Qwest's SGATs in Montana, Utah and Wyoming contain discriminatory provisions with respect to building new facilities. These three states permit Qwest to refuse to build new facilities for CLECs where such facilities are needed to provision a CLEC's UNE-order, and where Qwest would build such facilities for itself. And each of these three states permits Qwest to cancel a CLEC's UNE order (either immediately or, in Montana, after 30 days) if Qwest concludes that capacity is not available, instead of holding the order indefinitely as Qwest does for its retail customers. This policy allows a customer selecting Qwest for service that requires new capacity to keep its place in the queue, while a customer who selects a CLEC finds its order cancelled and loses the priority it would otherwise have had for obtaining service had Qwest simply held the CLEC's order. The Washington Commission recognized Qwest's obligation to provide UNEs to CLECs and required Qwest to modify its SGAT to reflect a more equitable arrangement.

40. In Montana, Utah and Wyoming, if a CLEC orders an unbundled loop and the facilities are not currently available, Qwest's SGATs provide that Qwest will build the loop only "if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic Local Exchange Service." SGAT § 9.1.2.1. As the SGAT states, "[i]n other situations, Qwest does not agree that it is obligated to build UNEs, but it will consider requests to build UNEs pursuant to Section 9.19 of this Agreement." *Id.* And under Section 9.19, Qwest applies the following standard: "Qwest will conduct an individual financial assessment of any request that requires construction of network capacity, facilities, or space for access to or use of UNEs." SGAT § 9.19.

41. As the Washington Commission correctly recognized, these provisions are discriminatory. The Washington Commission therefore required Qwest to add language to its Washington SGAT that requires it to build whenever it would build for itself. *See* Washington SGAT § 9.1.2.1 and 9.19.

42. Qwest's invocation of its POLR and ETC obligations is obviously inapposite, because those obligations are limited to DS0 loops. Thus, Qwest's position is that it has no obligation to expand or augment its network to permit CLECs to provide DS1 or higher loops where such network capacity does not currently exist. As the Washington Commission understood, Section 251(c) requires more. Qwest must provide nondiscriminatory access to UNEs, and the statute's nondiscrimination requirement means that Qwest must build for CLECs whenever it would build for itself. Section 9.19 of the three non-Washington SGATs, however, states merely that Qwest will "conduct an financial assessment" of any CLEC request to build new unbundled elements, which thus provides Qwest standardless discretion to refuse to build for CLECs in circumstances when Qwest would build for itself.

43. In particular, Qwest has authority under these SGATs to refuse to build a facility as a UNE for a CLEC when Qwest would build that same facility to enable Qwest to provide the same service to the same retail customer that the CLEC proposes to serve. Similarly, Qwest retains the ability to refuse to build a facility as a UNE under the agreements but to agree to build the same facility for the CLEC if the CLEC orders the facility as a retail service. These provisions are not only blatantly discriminatory, but they are fundamentally anticompetitive, because under these three SGATs, Qwest is the only LEC that can effectively compete for new customers' loops (because it can refuse to build loops for anyone but itself).

44. It should also be noted that, in building new loops for CLECs, Qwest would rarely, if ever, be required physically to install new copper or fiber in new conduit laid in newly acquired rights of way between an end office and the customer premises, as the CLEC would have to do. Rather Qwest would almost always be able to take advantage of its existing, ratepayer-financed infrastructure – *i.e.*, poles, conduits, rights of way, and copper or fiber conductors – that Qwest has already deployed and is using today. Indeed, Qwest has numerous options for quickly and cheaply augmenting facilities for its own use, such as employing newer electronics on optical fiber to increase capacity for additional loops and transport on an existing fiber. A CLEC, by contrast, would by definition be "impaired" without access to Qwest's loops, for a CLEC would be faced with building on the same route by digging up the ground and placing new fiber, a much slower and far more costly proposition.

45. Moreover, Qwest's TELRIC rates and the models that generated them confirm that in fact the CLECs are already paying for the construction of new facilities in UNE rates. The cost models all contain "fill factors" that model the average capacity of facilities in a forward-looking network. The lower the fill factor, the sooner Qwest should build new facilities and the higher the price the CLEC will pay for the UNE. For example, if the fill factor used for DS1 loops is 50%, the assumption is that Qwest will start construction of new facilities on routes such that the average fill factor stays at 50% over time. When the CLEC pays for a DS1 loop, it is paying for a network that is only, on average, at half capacity. If Qwest refuses to build new facilities, allowing the utilization and thus the fill factor to increase, then the CLEC would be overpaying for the UNEs.

46. Montana, Utah and Wyoming also permit Qwest to discriminate against CLECs in one additional, important area with respect to the building of new facilities. In these states, the

SGATs permit Qwest, when it does not have capacity to fill a UNE order, to see whether facilities become are available, and then, if capacity is unavailable, to reject the order. SGAT §§ 9.1.2.1.3.2; 9.2.2.16. At that point, the CLEC must "submit a request to build UNEs pursuant to Section 9.19 of this Agreement." In Montana, Qwest will wait 30 days before rejecting the order. In Utah and Wyoming, Qwest rejects the order without waiting 30 days (because the SGATs in those states do not contain the § 9.2.2.16 found in the Montana SGAT). In none of these states does Qwest treat the CLEC's order as it would an order from one of its own retail customers. Those orders are held indefinitely until Qwest builds the facilities to provision the requested service. Only in Washington did the Commission stop this discriminatory practice by changing the SGAT language to require that Qwest keep CLEC orders open as it does for retail customers.

47. Qwest's policy toward CLEC UNE orders is discriminatory and flawed in several respects. First, Qwest has not invoked a similar order rejection policy for its retail customers. Qwest will take a retail customer order and hold it for facilities as long as the retail customer likes. Retail customers will come to understand that if they order from Qwest, in an area where facilities are scarce, they are likely to get service faster than by ordering through CLECs. Qwest is discriminating against its wholesale customers by refusing to keep track of CLEC held orders and failing to take those held orders into account in developing its construction plans.

48. Second, Qwest is able to guarantee potential retail customers that order service requiring a facilities-build that Qwest can place that order higher in the queue for new facilities than a CLEC ever can. By rejecting, rather than holding a CLEC's UNE order, the CLEC's order and its customer are put out of the queue. In addition, Qwest will always possess superior and advanced knowledge regarding its own build plans. Qwest's interconnection agreements

expressly limit the notice that Qwest must provide CLECs of major facilities construction to large projects that exceed $100,000 in costs:

> Qwest will provide CLEC notification of major Loop facility builds through the ICONN database. This notification shall include the identification of any funded outside plant engineering job that exceeds $100,000 in total cost, the estimated ready for service date, the number of pair or fibers added, and the location of the new facilities (e.g., Distribution Area for copper distribution, route number for copper feeder, and termination CLLI codes for fiber). CLEC acknowledges that Qwest does not warrant or guarantee the estimated ready for service dates. CLEC also acknowledges that funded Qwest outside plant engineering jobs may be modified or cancelled at any time.[11]

49. This provision does not alleviate concerns that Qwest will be able to give its customers preferential treatment in the design, development and access to future facilities builds initiated by Qwest. Many projects will not meet the $100,000 threshold and the CLEC will have no advanced knowledge when Qwest is deciding to modify or cancel projects, or for that matter, when they plan to initiate new projects.[12]

50. This issue also applies to UNEs other than loops, because Sections 9.2 and 9.19 are broadly worded to cover all UNEs. For example, Qwest should be required to light unused dark fiber or augment electronics to provide UNEs, including UNE transport, to CLECs. Qwest has taken the position that it does not have to light unused dark fiber and make it available as dedicated transport or replace the electronics to expand the existing capacity to make interoffice transport available because it has no obligation to build UNEs. Qwest is misreading the FCC's

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[11] SGAT § 9.1.2.1.4.

[12] Third, as described in the Finnegan Declaration, the policy appears to be primarily designed to alter Qwest's performance reporting, creating the false perception that Qwest is provisioning network elements, especially loops, at a quantity and with the timeliness that CLECs may demand.

rule that it does not have to build dedicated transport. Consistent with basic engineering principles, the FCC has concluded that dark fiber is no different than unused copper capacity that is "dormant until carriers put it into service."[13] The FCC also noted that dark fiber "is physically connected to the incumbent's network and is easily called into service."[14] Qwest has never argued that it has no obligation to provide unused copper capacity. Similarly, if the dark fiber is in place, Qwest should not be permitted to claim that it does not have to do what is necessary to call that dark fiber into service to meet orders for dedicated transport, particularly when Qwest does so to meet its tariff customers' needs.

51. Qwest increases the capacity of facilities for itself by the use of electronics but will not do so for CLECs. Given that Qwest routinely lights dark fiber or replaces electronics to make transport capacity available to its own customers, its refusal to do so for CLECs is discriminatory and anticompetitive. By the same token, Qwest should augment switch facilities, loop facilities and other UNEs when capacity is otherwise exhausted. Anything less constitutes discrimination against CLECs.

III. CHECKLIST ITEM #4: LOOPS AND NID

A. Qwest Does Not Provide Nondiscriminatory Access To The NID.

52. In Montana, Utah, and Wyoming, Qwest fails to provide nondiscriminatory access to the NID, because it refuses to remove unused loops from the protector side of the NID to make room for a CLEC that wins the customer. *See* SGAT § 9.5.2.1 and 9.5.2.5.

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[13] *UNE Remand Order* ¶ 325; *see also id.* ¶ 327.

[14] *UNE Remand Order* ¶ 328.

53. This issue arises principally in the context of AT&T's cable telephony offerings, where AT&T has its own loops to multi-tenant dwellings. It is often the case that condominiums or other multi-unit housing developments have covenants that prohibit the placement of an additional NID on a house or building. In those instances, AT&T *must* have access to the protector side of the Qwest NID, or else it cannot serve the customer. It is unreasonable for AT&T to take its own loop facilities all the way to the MTE or residence only to find out that it can not place a NID on the building and it can not use the protector side of the Qwest NID.

54. Under Qwest's SGATs, however, Qwest refuses to remove unused loops from the NID to make space for the CLEC that wins a customer. *See* SGAT §§ 9.5.2.1 ("At no time should either Party remove the other Party's loop facilities from the other Party's NID") and 9.5.2.5 ("If a CLEC accesses the Qwest protector field it shall do so on the distribution side of the protector field only where spare protector capacity exists"). Qwest's rationale for refusing to remove unused loops is a pure makeweight. Unused loops can be safely removed from the protector field of the NID and appropriately capped. Bell System practices show that such capping of unused loops can be properly done. Qwest has tried to hide behind the National Electrical Code, relying on the provisions of that code that require grounding of all circuits. In fact, my analysis of the National Electrical Code has determined that the Qwest interpretation is incorrect. The Code actually states that circuits must be grounded whether or not they terminate at a premises. Qwest must have proper grounding on all circuits before they are "dropped" to the premises. It is, in fact, fairly common field practice for Qwest employees to pull unused loops off of NIDs and for loops to be left unterminated at new installations. Qwest is simply making up conditions to prevent the CLEC from gaining legal access to the full features and functions of the unbundled NID.

55. Qwest's SGAT preclusion for the removal of unused circuits from a NID, at paragraph 9.5.2.1, has caused AT&T additional problems in Utah and other states. At many residences, the Qwest NID contains an outdated, carbon based protector on the inside of the house. This is actually an installation that can prove hazardous and is no longer used. Qwest is refusing to allow AT&T to disconnect the unused Qwest circuit and terminate it properly. AT&T installs a modern NID on the outside of the building and must have access to the wire that goes inside of the building. Qwest, however, has no better proposal for AT&T to efficiently connect its loops to the customer's premises wiring. The National Electrical Code dictates that a protector must be put on the loop before the loop goes inside the building in most situations.

56. Washington required Qwest to delete the sentence in SGAT paragraph 9.5.2.1 that prohibited the CLEC from removing Qwest's unused facilities from the NID. In addition, Washington added the following language to paragraph 9.5.2:

> When CLEC removes Qwest facilities from the NID protector, it must terminate the spare Qwest Loops on protection devices that ensure that Qwest's facilities and the Customer's premises be protected from electrical surges. In such instances, CLEC must provide Qwest with written notice within 10 days that it had so disconnected the Qwest facilities from the protection device. CLECs will be liable for damages in situations where their technicians have failed to follow standard electrical protection and safety procedures. To the extent Qwest is damaged as a result of CLEC's failure to follow standard electrical protection and safety procedures, CLEC shall be liable to Qwest, subject to the indemnity and limitation of liability provisions of this Agreement.

This language allows the CLEC to properly terminate the unused loop and attach the new loops in an approved manner. Qwest must do the same in all of the other states in its region.

IV. CHECKLIST ITEM #5: TRANSPORT

A. Qwest's Distinction Between UDIT and EUDIT Conflicts With the FCC's Definition of Dedicated Transport.

57. Qwest's SGATs in Montana, Utah and Wyoming contain unjust and unreasonable methods of charging CLECs for unbundled dedicated transport. *See* SGAT § 9.6.1.1. Qwest forces CLECs to purchase both Unbundled Dedicated Interoffice Transport ("UDIT") and something called "Extended Unbundled Dedicated Interoffice Transport" ("EUDIT"), the latter of which is a flat-rated, non-distance-sensitive charge that serves only to raise the cost of purchasing transport. This issue closely parallels the issue concerning entrance facilities for interconnection trunks. *See* Section I.A., above.

58. The FCC has made clear that "incumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers."[15] This includes, at a minimum, interoffice facilities between end offices and serving wire centers ("SWCs"), SWCs and interexchange carrier ("IXC") points of presence ("POPs"), tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent LECs and requesting carriers."[16] "[A]n interoffice facility could be used by a competitor to connect to the incumbent LECs switch or to the competitor's collocated equipment."[17] Moreover, the FCC requires dedicated transport to be recovered through a flat-rated charge.[18] As a general rule, the costs for network elements "must recover costs in a manner that reflects the way they are incurred."[19]

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[15] *UNE Remand Order*, ¶ 323.

[16] *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).

[17] *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(2)(C).

[18] 47 C.F.R. §§ 51.507(a) and 51.509(c); *Local Competition Order*, ¶ 744.

[19] *Local Competition Order*, ¶ 743.

59. Qwest's rate structure for EUDIT does not follow the FCC's guidelines, because the rate for the EUDIT is non-distance sensitive. Under Qwest's UDIT-EUDIT distinction, UDIT is Qwest's charge for dedicated transport between Qwest's wire centers. If a CLEC wants dedicated transport from its wire center (or an IXC from its POP) to a Qwest wire center (the first wire center is called the serving wire center (or SWC) by Qwest), the CLEC must order EUDIT. UDIT is a distance-sensitive, flat-rated rate element. EUDIT is a flat-rated, non-distance sensitive element. It is an average rate usually identical to the loop rate, as if the CLEC were an end user instead of a local exchange carrier. *See* Diagram 5. The principal effect of the EUDIT charge is to increase greatly the total cost of a circuit from point to point. Under the Qwest scheme, the total price for dedicated transport is the sum of UDIT and EUDIT, rather than the price for the total facility distance based on UDIT alone.

60. Qwest's EUDIT charge is unlawful because it fails to reflect the way costs are incurred. There is no economic or engineering difference whatsoever between the transport link between the CLEC's switch and the SWC and the second link between Qwest's wire centers, and thus there is no conceivable justification for creating separate UDIT and EUDIT charges. Indeed, Qwest has made the distinction to perpetuate a rate structure used in the access world. The EUDIT is very similar to entrance facilities in the context of access services, which are priced like loops and were originally designed to function as subsidy elements. The EUDIT/UDIT distinction is a disincentive for a CLEC to use the transport UNE and will slow market entry. Relatively few EUDIT/UDITs are in use in the Qwest region.

61. The EUDIT/UDIT distinction also imposes disincentives on the CLEC to build facilities to a meet point between the CLEC wire center and the Qwest SWC. A CLEC that elects to build closer to a Qwest serving wire center gains no benefits from doing so under

Qwest's SGATs, because the CLEC would still have to pay the entire, non-distance-sensitive EUDIT rate. The EUDIT, because it is non-distance sensitive, is not adjusted to reflect the portion of the facility built by the CLEC. If the CLEC must pay the entire rate, it has no incentive to build any of its own facilities between its wire center and Qwest's SWC. This alone demonstrates that the EUDIT is not cost-based, as required under § 252(d) of the Act.

62. Qwest's proposal is also discriminatory. Qwest permits CLECs to use UDIT to connect to another independent telecommunications carrier or local exchange carrier using a midspan meet arrangement, which is priced on a fixed and per mile basis. If a CLEC wants to obtain dedicated transport from Qwest to connect from a Qwest wire center to another local exchange carrier, it can order a distance-sensitive UDIT. (Qwest made this concession because that is how it has always treated neighboring independent LECs.) But if a CLEC wishes to obtain dedicated transport to connect its wire center to a *Qwest* wire center, it must use a non-distance sensitive EUDIT. CLECs should have the same ability to obtain dedicated transport on a distance-sensitive rate from Qwest wire center to the CLEC wire center as it does to other carriers.

63. The entire dedicated transport link from point A to point Z should be based on a distance sensitive, flat rate charge, which would more accurately reflect the costs to the CLEC. Indeed, other state commissions in the Qwest region have rejected the distinction,[20] and Qwest's Washington and Colorado SGATs now contain only the UDIT charge. *See* Washington SGAT §9.6.1.1. In addition, while EUDIT is still in the Utah SGAT, Utah has ordered Qwest to change

[20] *E.g., In re Investigation Into [Qwest's] Compliance With Section 271*, Washington Utils. & Transp. Comm'n Docket Nos. UT-003022 & UT-003040, Twenty-Fourth Supp. Order at 11 (Dec. 20, 2001).

the prices for EUDIT to be structured the same as UDIT. While Qwest has not yet filed prices to implement this Utah cost docket decision, AT&T is hopeful that the price will ultimately be the same for UDIT and EUDIT in Utah.

B. Qwest Also Imposes Unlawful Restrictions On Dark Fiber.

64. Qwest also imposes two unlawful restrictions on the availability of dark fiber. First, in all four states, Qwest's SGAT (§ 9.7.2.9) imposes the Commission's use restrictions for EELs on the availability of dark fiber. Qwest also places unlawful restrictions in all four states on the ability of CLECs to obtain dark fiber used for the provision of local exchange services when that fiber happens to be owned by Qwest's affiliates.

65. I understand that Qwest's defenses of these provisions are purely legal, and AT&T addresses those claims in the comments. I would note, however, that Qwest's restrictions create an enormous disincentive to order dark fiber. The Commission's use restrictions on EELs are so broad and cumbersome that they effectively preclude CLECs from obtaining them. Moreover, dark fiber loops will be used to connect large MTE buildings. The planning and installation of high capacity facilities that would traverse the dark fiber when it is lit is generally done in anticipation of several customers getting service. In most situations the amount of local use traffic will be unknown at the time when fiber is ordered. Operations people understand this and are therefore very reluctant to use dark fiber when there is the chance that it would later fail a local use test.

C. Qwest's Provisioning of Dark Fiber to CLECs is Discriminatory

66. Qwest's provisioning of dark fiber for CLECs, as described in its technical publications, is discriminatory. The Qwest provides retail customers better engineering design

service, better testing and better maintenance of dark fiber. Tech Pub 77383 (Unbundled Dark Fiber) contains details of the provisioning, testing and maintenance that Qwest gives to CLECs for dark fiber. Tech Pub 77348 (Qwest Dark Fiber), lists the terms that Qwest gives retail customers. There are glaring technical differences between what is offered by the two documents.

67. First, Qwest provides its retail customers with a copy of the dark fiber transmission design. This will show the customer how the fiber is engineered and provisioned. No such transmission design is offered to CLECs. Secondly, Qwest tests retail fiber to specific measurement criteria including end-to-end attenuation measurements at two frequencies. This will assure the retail customer that the fiber meets standards for loss. Qwest also provides a copy of the acceptance test to the retail customer. For CLEC dark fiber, Qwest merely tests for continuity and does not consent to give the CLEC a copy of the acceptance test. Third, Qwest promises to maintain the transmission performance at the designed transmission parameters, guaranteeing to restore the fibers to meet transmission design if they fall below the design standards. For CLEC customers the maintenance standard is far less certain. Qwest actually states that: "The condition of a particular fiber may have changed over time. Qwest considers a fiber as good when there is optical continuity."[21] Clearly, the dark fiber service that Qwest promises to retail customers is far superior to that which is promised to CLECs.

68. Qwest has the obligation to provide Unbundled Network Elements to CLECs in a manner that is nondiscriminatory, compared with what it provides to its retail customers. For dark fiber, Qwest is clearly providing discriminatory service. Qwest is discriminating in the

[21] Qwest Technical Publication 77383.

initial engineering service provided to CLECs, they are discriminating in the acceptance testing provided to CLECs and they are discriminating in the level of maintenance that is provided to CLECs.

V. CHECKLIST ITEM #6: - SWITCHING

69. Section 271(c)(2)(B)(vi) of the competitive checklist requires a BOC to provide '[l]ocal switching unbundled from transport, local transmission, or other services."[22] As demonstrated below, Qwest fails to satisfy the checklist on the issue of switching for two reasons. First, in Utah and Washington, Qwest refuses to provide switching or UNE-P when the end user has 3 or more lines in a wire center instead of three or more lines in a single location. Second, in all states, Qwest is providing CLECs with discriminatory low quality packet switching.

A. In Washington and Utah, Qwest Improperly Has Expanded The Commission's Narrow Exception To Its Obligation to Provide Switching As An Unbundled Network Element.

70. The Commission has concluded that unbundled local switching is a UNE that ILECs must make available to competitive LECs.[23] The Commission, however, made a narrow "exception" to this rule:

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[22] 47 U.S.C. § 271(c)(2(B)(vi).

[23] *UNE Remand Order*, ¶ 253.

> We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link ("EEL"), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas ("MSAs").[24]

This narrow exception applies in Utah and Washington, which contain such MSAs. In both Utah and Washington, however, Qwest is not in compliance with the Commission rule because it has interpreted this exception in a manner that significantly and improperly expands its scope and thus allows Qwest to circumvent its switching obligations.

71. Specifically, the Commission's exception to its rule that unbundled local switching is a network element is that ILECs do not have to provide unbundled local switching to *customers with 4 or more lines in density zone 1 wire centers* if the ILEC makes the EEL available.[25] In particular, Qwest's SGATs in Utah and Washington provide that "[t]his exclusion will be calculated using the number of DSO-equivalent access lines CLEC intends to serve an END USER Customer within a Wire Center . . . ."[26] Put another way, Qwest intends to count the total number of lines an individual customer has in a wire center to determine whether this exception applies. Qwest's filing here confirms that it contends that lines "should be counted on a per-wire-center basis."[27]

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[24] *Id.*, ¶¶ 253 & 278.

[25] *UNE Remand Order*, ¶ 253.

[26] SGAT §§ 9.11.2.5.2, *see also id.* § 9.11.2.5.1.

[27] Declaration of Lori A. Simpson and Karen A. Stewart, Checklist Item 6 of Section 271(c)(2)(B): Unbundled Switching and Packet Switching, at 13, ¶ 21.

72. That line count, however, should be done on a location-by-location basis. Indeed, the Commission so held in its recent *Virginia Arbitration Order*, released July 17, 2002.[28] Thew Commission has no conclusively rejected Qwest's position as unlawful, and Qwest's SGAT with respect to the 3-line rule is now indisputably in violation of the Commission's rules.

B. Qwest Offers Only Substandard And Discriminatory Packet Switching Options for CLECs

73. Qwest also fails to comply with Section 271(c)(2)(B)(vi) because Qwest offers only substandard and therefore discriminatory packet switching options for CLECs.

74. Qwest acknowledges that the Commission requires it to provide, under specific circumstances, "unbundled packet switching in a non-discriminatory manner."[29] Qwest also acknowledges that the likelihood that those circumstances will be satisfied has increased because Qwest recently "announced plans to remotely deploy DSLAMs on a broader scale."[30] As the Commission has explained, if certain other pre-conditions are met, "incumbent LECs must provide requesting carriers with access to unbundled packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal," but the ILEC does not "permit[] a requesting carrier to collocate its DSLAM in the incumbent's remote terminal, on the same terms

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[28] *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for the Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 360 (rel. July 17, 2002) ("*Virginia Arbitration Order*").

[29] Declaration of Lori A. Simpson & Karen A. Stewart, Checklist Item 6 of Section 271(c)(2)(B): Unbundled Switching and Packet Switching, at 29, ¶ 48.

[30] *Id.* at 31-32, ¶ 52.

and conditions that apply to its own DSLAM."[31] Accordingly, there is an increasing likelihood that Qwest will be required to provide unbundled packet switching to competitive LECs.

75. A review of Qwest's technical publication, however, makes clear that Qwest will only provide the worst class of service to CLECs for packet switching. The following text is from Technical Publication 77408, which applies throughout Qwest's region:

> **2.2.2 Class of Service**
> The ATM class of service for all PVCs provisioned on the UPS ATM Interface will be Unspecified Bit Rate Service (UBRS). UBRS is a best effort service designed to support connections carrying information flowing at uneven rates. It is intended for non- real-time applications that are very tolerant to delay, delay variation and cell loss.
> UBRS does not specify traffic related service guarantees. Specifically, UBRS does not include the notion of a per-connection negotiated bandwidth. No numerical commitments are made by Qwest with respect to the cell loss ratio experienced by a UBRS Connection, or to the cell transfer delay experienced by cells on the connection. Additional information about UBRS can be found in PUB 77378, *Qwest Corporation ATM Cell Relay Service.*[32]

Qwest's Unspecified Bit Rate Service is the poorest of five grades of service offered by Qwest to its retail customers. In contrast to that poor-grade service, the following excerpt is from the Qwest product description of ATM service for its retail customers:

> **Benefits**
>
> **A Comprehensive Solution**
> It's your business—you call the shots. Qwest ATM service helps you prioritize data, voice, video, and Internet traffic your way, based on your individual requirements. Tap into the power of the Qwest Fiber Network:
>
> - Flexible networks for data, voice, video, and Internet traffic
> - Scalable domestic port speeds of DS-1, DS-3, and OC-3
> - Qwest ControlSM for a web based network management interface*

[31] *UNE Remand Order*, ¶ 313.

[32] Exhibit KLW-ES-6: Qwest Technical Publication 77408, Unbundled Packet Switching, Issue C, January 2002, Paragraph 2.2.2.

- ATM-to-Frame Relay interworking capabilities

With a self-healing network and a various Quality of Service (QoS) levels, Qwest can deliver a custom solution to meet your needs:

- **CBR:** Constant Bit Rate
- **VBRrt:** Variable Bit Rate—real-time*
- **VBRnrt:** Variable Bit Rate—non real-time
- **ABR:** Available Bit Rate*
- **UBR:** Unspecified Bit Rate*.

Pay for what you need.
With Qwest ATM, you only pay for what you need, instead of a fixed monthly amount. Qwest out-of-region ATM supports Permanent Virtual Circuits (PVCs) and Permanent Virtual Paths (PVPs), in addition to Switched Virtual Circuits (SVCs*) which provide flexible and economical options so you're not locked into a fixed network configuration. * Service not available in all areas.[33]

It is clear that Qwest is offering multiple options for the class of service that retail customers can order. CLECs, however, are only offered the worst performing class of service.

That conclusion is reinforced by the following excerpt is from the Qwest Technical Publication 77378, ATM Cell Relay Service:

2.2.13 Qwest ATM Unspecified Bit Rate
Unspecified Bit Rate (UBR) is a "best effort" service designed to support connections that transmit and receive at uneven rates, i.e., applications not requiring tightly constrained delay, delay variation, and cell loss. Examples of such applications are traditional computer communications applications, such as file transfer and email, typically using TCP/IP. The ATM Forum refers to this type of information as Unspecified Bit Rate (UBR) traffic.

UBR does not specify traffic related service guarantees. Specifically, UBR does not include the notion of a per connection negotiated bandwidth. Qwest does not make Service level commitments with respect to the overall cell loss ratio experienced by a UBR connection, or as to the cell transfer delay experienced by cells on the connection.

The traffic descriptor for UBR connections is defined by the PCR. Since no numerical commitments are made on UBR connections there is no corresponding ECR identified for network resource utilization. Unlike CBR, VBR, and ABR, UBR PVCs are not

[33] Qwest retail product description (large business solutions) for ATM, from Qwest Website: URL is http://www.uswest.com/pcat/large_business/product/1,1354,767_4_3,00.html.

considered in the summation of bandwidth over a port. Although, each UBR PVC will be taken in account when determining the maximum allowable number of PVCs across a port. UBR connections can be provisioned only as VCCs.[34]

Qwest's own publications confirm that the UBR service it offers to competitive LECs is a low-grade service that is only applicable to email and downloading of files. Indeed, the following excerpt from Qwest's Technical Publication 77378 shows that Qwest makes no performance commitments for UBR.

> **6.2.5 Qwest ATM Service Network Traffic Control Procedures for UBR**
> Unspecified Bit Rate (UBR) is a "best effort" service designed to support a connection carrying information flowing at uneven rates. UBR does not specify traffic related service guarantees. Specifically, UBR does not include the notion of a negotiated, per connection bandwidth. Qwest makes no numerical commitments with respect to the cell loss ratio experienced by a UBR connection, or as to the cell transfer delay experienced by cells on the connection.
>
> Traffic control for Qwest ATM UBR is based on the Peak Cell Rate (PCR). The PCR for Qwest UBR PVCs is set to the line rate of the subscribed port. Since no numerical commitments are made on UBR connections there is no corresponding Equivalent Cell Rate (ECR) identified for network resource utilization. Unlike CBR and VBR, UBR PVCs are not considered in the summation of bandwidth over an interface. However, the UBR PVC will be taken in account when determining the maximum allowable number of PVCs across an interface. The Qwest ATM node UPC function will monitor the cell stream to test conformance with the connection's PCR. All cells found to be non-conformant with the logical connection's provisioned characteristics, e.g., any cell exceeding the PCR may be discarded at the source UNI.[35]
>
> **7.3 Performance Parameters Definitions**
> The service performance parameters for Qwest ATM Service are shown in Table 7-1 and described below. Performance parameters for UBR are not specified.[36]

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[34] Exhibit KLW-ES-11: Qwest Technical Publication 77378, ATM Cell Relay Service, Issue E, October 2001, Paragraph 6.2.5.

[35] *Id.* ¶ 6.2.5

[36] *Id.* ¶ 7.3.

76. In sum, although Qwest is obligated to provide, when certain preconditions are met, unbundled packet switching on a non-discriminatory basis, it has failed to satisfy that obligation, offering CLECs only the lowest quality ATM connection from the DSLAM to the CLEC equipment. The connection that Qwest is providing is only suitable for email and downloading internet information, but is not suitable for streaming audio, streaming video, VOIP or other internet-based services that define current high capacity service.

77. By failing to provide unbundled packet switching on a nondiscriminatory basis, Qwest has failed to satisfy Section 271(c)(2)(B)(vi).

VERIFICATION

I Kenneth L. Wilson declare under penalty of perjury that the foregoing Declaration is true and correct.

/s/ Kenneth L. Wilson
Kenneth L. Wilson

Executed: August 1, 2002